

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 33 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

DESUR NARAN & MASARI DESUR

Versus

STATE OF GUJARAT

Appearance:

MR ASWIN H. DESAI WITH MR. ND NANAVATI for Petitioner
MR ST MEHTA ADDL PUBLIC PROSECUTOR
for Respondent

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 30/07/98

ORAL JUDGEMENT

In this criminal appeal, the appellants original accused have brought in challenge judgment and order of recording convictions dt. 23/12/1998 passed in Sessions Case No.2 of 1987 by the learned Additional Sessions Judge, Junagadh at Porbandar, whereby appellant no.1 (accused No.) was convicted for the offence punishable under Sec.325 of Indian Penal Code ("I.P.C." for short)

and sentenced to suffer R.A. for three years and to pay a fine of Rs.500/- and i/d. of payment of fine, to undergo further R.I. for a period of two months, while appellant no.2/accused no.2 was convicted for commission of offence punishable under Sec.323 of I.P.C. and was sentenced to suffer R.I. for six months and to pay a fine of Rs.250/and i/d. of payment of fine, to undergo R.I. for a further period of one month on accusation of having committed murder of Veja Malde and causing injury to witness Gaga Embha by inflicting stick blows to both of them.

2. The prosecution case in nutshell is as under:-

(i) As per the prosecution case, on 18/6/1986 at 9-00 P.M. the accused was in his farm situated on the western side of sim of the village Siddhpur, where the alleged incident has taken place. On 17/6/1986, the daughter of accused no.1 and sister of accused no.2 named Bai Rani has called the Deceased Veja Malde to meet her on the next day at her farm and in pursuance to the said arrangement, deceased Veja Malde along with witness Gaga Ebha went to the farm of accused on 18/6/1986 at about 9-00 night. When they reached near Rani, both the accused came with the sticks and on seeing them, both deceased Veja Malde and Gaga Ebha tried to run away from the place of occurrence. However both chased Veja Malde and Gaga Ebha, and have severely beaten them by the sticks. It is further case of the prosecution that the intention was to commit murder of Veja Malde and attempt to commit murder of witness Gaga Ebha.

(ii) Aforesaid occurrence was reported telephonically by one Vejasibhai of Sidhdhpur to Kutiyana Police Station on 18/6/1986 at 11-35 night. The office copy of the said report was produced on record at Ex.21. Thereafter, during the course of treatment, Veja Malde succumbed to the injuries on 21/6/1986 at 4-10 P.M. and report in that connection was conveyed to Kutiyana Police Station by Junagadh City Police as the deceased died at the Civil Hospital at Junagadh. The office copy of the said report is produced on record at Ex.22. On the basis of the report at Ex.22, Police Sub Inspector Laxmidas Vernajarbhai Hingrajia gave complaint in writing for the alleged occurrence and the same was given Mark A, and thereafter, the investigation was entrusted to P.S.I. After taking charge of investigation, P.S.I.Hingarajia visited place of occurrence, prepared Panchnama of scene of offence, collected sample of dust stained with blood from the place of occurrence, recorded statements of the witnesses and arrested the accused and also recovered the

sticks from the accused persons which were used for commission of the offence and prepared recovery Panchnama in that regard in presence of the Panchas. During the course of investigation, as Veja Ebha has died, the Inquest Panchnama of dead body was prepared and thereafter dead body was sent for autopsy, and Muddamal which were collected during the course of investigation were sent to Forensic Science Laboratory for analysis.

(iii) On completion of investigation, the accused were chargesheeted for the commission of offences punishable under Sec. 302-307 of I.P.Code and thereafter the case was committed to the Court of Sessions. The learned Additional Sessions Judge, Junagadh at Porbandar registered it and the same is numbered as Sessions Case No.2 of 1987.

3. Necessary charge was framed against both the accused. Both of them pleaded not guilty to the charge and claimed to be tried and therefore, they were put on trial. In order to bring home charge levelled against the accused, the prosecution led oral as well as documentary evidence.

4. On overall appreciation of the prosecution evidence and considering the documentary evidence produced before him, the learned Additional Sessions Judge came to the conclusion that both the accused had not inflicted the stick blows upon the deceased Veja Malde and witness Gaga Ebha with an intention to commit their murder. However, the learned trial Judge came to the conclusion that the act of accused no.1 was to cause grievous hurt to the deceased punishable under Sec.325 of I.P.C., while the act of accused no.2 was to cause simple injury to the witness Gaga Ebha punishable under Sec.323 of I.P.C. and therefore, the learned trial Judge has held both the accused guilty not for the offence punishable under Sec. 302 or Sec.307 of I.P.C. but has recorded the findings of conviction for the commission of offence punishable under Sec. 325 of I.P.C. qua accused no.1, while conviction for the commission of offence punishable under Sec. 323 of I.P.C. was recorded qua accused no.2 and both the accused were sentenced as aforesaid. It is this judgment and order of recording conviction and sentence for the offences punishable under Sec. 325 and 323 of I.P.C. against the accused no.1 Desur Naran and accused no.2 Masari Desur respectively, passed by the learned Additional Sessions Judge, Porbandar, which is the subject matter under challenge before me.

5. At the time of hearing of this appeal, Mr. N.D.Nanavati, the learned advocate appearing for the accused has made the statement at the Bar that the accused no.1 Desur Naran has died during pendency of this appeal on 17/9/1991 at Junagadh, and therefore, this appeal qua accused no.1 Desur Naran abets. He placed on record the death certificate in this regard issued by the office of Sub Registrar, Birth & Death, Nagarpalika, Junagadh. In view of the matter, I am of the view that the appeal abetes qua accused no.1 Desur Naran, when the appellant no.1 original accused no.1 has died during the pendency of this appeal by virtue of the provisions contained in sub-sec.(2) of Sec.394 of the Criminal Procedure Code, 1973. The death certificate be taken on record of this case.

6. Now so far as appellant no.2 Masari Desur is concerned, Mr. Nanavati has fairly submitted that looking to the evidence on record, he does not want to prosecute the appeal on merits qua accused no.2, and prayed that a mercy may be shown towards the accused no.2 instead of sending him to Jail to serve out the sentence imposed by the learned Additional Sessions Judge. In this regard, he has submitted that this incident has taken place in the year 1986 and as such about 12 years has lapsed. The learned trial Judge has convicted the appellant no.2 original accused no.2 for the commission of offence punishable under Sec. 323 of I.P.C. and sentenced to suffer R.I.for six months and to pay a fine of Rs.250/- i/d. of payment of fine, to undergo R.I. for a period of one month. He submitted that the accused has already paid the fine and now he is not residing in that very village and has left the said village long back and is permanently residing at Junagadh and had already undergone sentence of 20 days during the pendency of the bail application, till he obtained bail. In view of this, he urges this court that by showing leniency and mercy towards the accused no.2, the accused may be imposed sentence period of 20 days which he had already undergone in Jail as aforesaid by treating it as substantive sentence, instead of sentence of six months as imposed by the learned trial Judge.

7. Having heard Mr. Nanavati, the learned advocate for the accused and Mr. Mehta, learned APP for the State Considering the facts and circumstances of the case, and evidence on record, I am of the view that when the incident had taken place in the year 1986 and the period of more than 11 years has lapsed and while admitting this appeal, the accused were released on bail by this Court on 24/1/1989, no useful purpose will be served by sending

the accused no.2 in Jail for serving out remaining period of sentence. If he is sent to Jail, he would come out with bad habits and may indulge in any illegal activities in the company of hardened criminals, which he might learn in Jail while serving out the remaining period of sentence in Jail. Therefore, it is not desirable to send him in Jail. It is also a fact that he is an agriculturist and way and manner in which the incident had taken place, it can not be gainsaid that prior to this incident, there was no enmity between him and the deceased. Alleged incident has taken place because of his sister Bai Rani and the accused might be under the impression that the deceased might be harassing his sister or there might be some affairs with her. Therefore, in hot excitement, he has inflicted stick blows to the deceased and witness. Subsequently, the stick blow which was inflicted by accused no.1 proved fatal for deceased Veja Malde. While the blow inflicted by the accused no.2 upon the witness was with an intention to cause simple injury to him. Now the accused no.1 has died during pendency of appeal. In view of the aforesaid submissions, I am fully convinced that no useful purpose will be served by sending the accused no.2 in Jail for serving out the remaining sentence. I, therefore, propose to modify the sentence of Rigorous Imprisonment of six months imposed by the learned trial Judge upon the accused no.2 to the extent that instead of period of imprisonment for six months, the accused no.2 to suffer R.I. for a period already undergone in Jail and instead of a fine of Rs.250/-, the accused no.1 to pay a fine of Rs.1,000/- and i/d of payment of payment of fine, to undergo R.I. for further period of one month. i.e. the accused no.2 is sentenced to suffer R.I. for the period which he had already undergone in Jail and to pay a fine of Rs.1,000, and i/d of payment of fine, to undergo R.I. for further period of one month.

8. In the premise, so far as appellant No. 1- Desur Naran is concerned, appeal abates. So far as appellant no.2 Masari Desur is concerned, appeal is partly allowed. Judgment and order of recording conviction against him for commission of offence punishable under Sec. 323 of Indian Penal Code is confirmed and maintained. The sentence of R.I. for a period of six months imposed upon appellant no.2 is modified and instead of that, sentence of 20 days already undergone by him is treated as substantive sentence of punishment and to pay a fine of Rs.1,000/- instead of Rs.250/- and i/d of payment of fine, he is ordered to suffer R.I. for further period of one month. Remaining amount of fine i.e. Rs.750/- shall be paid by the appellant no.2/accused no.2 on or before

15th of September, 1998 before the Lower Court, failing which, the learned trial Judge is directed to issue NON-BAILABLE warrant against the appellant no.2/accused no.2 to serve out the sentence of one month imposed upon him in default of payment of fine.

(ccs)